CENTER FOR BIOLOGICAL DIVERSITY

CALIFORNIA AND PACIFIC OFFICE

protecting and restoring natural ecosystems and imperiled species through science, education, policy, and environmental law

May 30, 2003

U.S. Department of Energy
Office of Energy Efficiency and Renewable Energy
Alternative Fuel Transportation Program: Private and Local Government Fleet Determination
EE-2G, Docket Number EE-RM-FCVT-03-001
1000 Independence Avenue, S.W.
Washington, DC 20585-0121
Email: regulatory_info@afdc.nrel.gov

Re: Comments on Private and Local Government Fleet Determination Notice of Proposed Rulemaking and Public Hearing, 68 Fed. Reg. 10,320 (March 4, 2003)

The following comments on the U.S. Department of Energy's ("DOE") Notice of Proposed Rulemaking and Public Hearing, 68 Fed. Reg. 10,320 (March 4, 2003), are submitted on behalf of the Center for Biological Diversity, Bluewater Network, and the Sierra Club. The Center for Biological Diversity is a non-profit, public interest organization with over 7,500 members throughout the United States dedicated to the preservation of native species and their habitats, as well as water quality, air quality, and open space. The Center's efforts include research and advocacy relating to the effects of oil exploration and air pollution associated with oil consumption on the environment. Bluewater Network is a national non-profit environmental organization based in San Francisco, California with over 3,000 members who reside throughout the United States. Bluewater Network has active campaigns focused on reducing emissions from the transportation sector, while also promoting the use of renewable fuels. The Sierra Club is a national conservation organization headquartered in San Francisco with over 600,000 members nationwide. For over three decades, the Sierra Club has worked to enact, strengthen, and enforce air pollution laws and regulations to reduce air pollution in the United States at the national, state, and local levels. The Center, Bluewater Network, and the Sierra Club object to DOE's failure to issue a proposed rule applying the Energy Policy Act's alternative fuel vehicle ("AFV") acquisition requirements to private and municipal fleets for the reasons provide below.

I. The Energy Policy Act's Fleet Requirements

The Energy Policy Act of 1992 ("EPAct"), 42 U.S.C. §§ 13201 et seq., establishes a comprehensive scheme to achieve environmental, economic, and national security benefits by promoting the use of alternative fuels and reducing the transportation sector's consumption of petroleum fuel. H. Rep. No. 102-474(I), reprinted in 1992 U.S.C.C.A.N. 1954, 1955, 1959,

Julie Teel, Staff Attorney
PO Box493, Idyllwild CA 92549
TEL.: (909) 659-6053 ext. 308 • FAX: (909) 659-2484
Email: jteel@biologicaldiversity.org • www.biologicaldiversity.org

102nd Cong., 2nd Sess. (1992). The Act confronts the "direct link between the level and type of energy consumption and the quality of the environment." Id. at 1955. The Act also embodies Congress's effort to enact a national energy policy that "gradually and steadily increases U.S. energy security" in part by "reduc[ing] our use of oil-based fuels in our motor vehicle sector" Id. "[A] barrel reduction in oil demand through substitution or efficiency is as valuable as an additional barrel of oil produced." Id. at 1957.

Congress intended EPAct to displace conventional petroleum fuel with non-petroleum energy sources, focusing on light-duty motor vehicle fleet operations. U.S. Department of Energy, Replacement Fuel and Alternative Fuel Vehicle Technical and Policy Analysis: Pursuant to Section 506 of the Energy Policy Act of 1992 (December 1999; amended in 2000), at 19-20. By initially focusing on federal fleets, Congress intended for the federal government to "pave the way for alternative fuel use and fuel flexibility for society at large by demonstrating the in-use practicability of the technology on a substantial scale and to provide the necessary critical mass to catalyze markets into supplying alternative fuels and vehicles with sufficient scale and access." Id. at 20. In this way, the federal fleet AFV requirements " would plant the seeds for growth of alternative fuel vehicle use." Id.

Under the Act, DOE is required to develop and oversee a program designed to replace 10 percent of our petroleum motor fuel consumption by the year 2000 and 30 percent by the year 2010. 42 U.S.C. § 13252(b)(2). To achieve this purpose, the Act contains several regulatory mandates, including the requirement that DOE determine whether to apply an AFV acquisition requirement like that applied to federal fleets to private and municipal fleets. Both are briefly reviewed below.

A. EPAct's Federal Fleet Requirement

EPAct section 13212(b)(1)(A-D) requires that 25 percent of the total number of EPAct-covered vehicles acquired by a federal fleet in fiscal year 1996 must be AFVs; 33 percent of the total number of covered vehicles acquired by a federal fleet in fiscal year 1997 must be AFVs; 50 percent of the total number of covered vehicles acquired by a federal fleet in fiscal year 1998 must be AFVs; and 75 percent of the total number of covered vehicles acquired by a federal fleet in fiscal year 1999 and thereafter must be AFVs. 42 U.S.C. § 13212(b)(1)(A-D). EPAct exempts law enforcement vehicles, military vehicles, emergency motor vehicles, vehicles held out to the public for sale, lease, or rental, non-road vehicles, and other specified vehicles from the Act's requirements. 42 U.S.C. § 13211(9).

The Act defines "alternative fuel vehicle" as a dedicated vehicle, meaning one that only operates on alternative fuel, or a dual fueled vehicle, meaning a vehicle that can operate on alternative fuel and gasoline or diesel. 42 U.S.C. § 13211(3), (6), and (8). The Act defines "alternative fuel" as methanol; denatured ethanol; and other alcohols; mixtures containing 85 percent or more methanol, denatured ethanol, and other alcohols with gasoline or other fuels; natural gas; liquefied petroleum gas; hydrogen; coal-derived liquid fuels; fuels derived from biological materials; electricity; and any other fuel the Secretary determines by rule is substantially not petroleum and "would yield substantial energy security benefits and substantial environmental benefits." 42 U.S.C. § 13211(2).

In addition to fulfilling EPAct's AFV acquisition requirements by purchasing AFVs as defined by the Act, the Act provides one AFV credit for every 450 gallons of biodiesel fuel in fuel

containing at least 20 percent biodiesel by volume for use in vehicles that weigh more than 8,500 pounds gross vehicle weight rating. 42 U.S.C. § 13220(a)(1), (f)(2)(A-B). Credits allocated under this section can be used to satisfy up to 50 percent of an agency's AFV requirements. 42 U.S.C. § 13220(b)(2).

B. EPAct's Private And Municipal Fleet Requirement

EPAct requires DOE to undertake a rulemaking process to determine whether or not AFV acquisition requirements must also be applied to private and local government fleets. 42 U.S.C. § 13257. Section 13257(d) required DOE to publish a proposed rule for a fleet requirement program by May 1, 1999, with hearings and public comment to follow. Id. at § 13257(d). By January 1, 2000, DOE should have determined whether a fleet requirement program applicable to private and municipal fleets was necessary. Id. at § 13257(e)(1).

Under EPAct, a private and municipal fleet program "shall be considered necessary" if DOE determines the following:

(1) the goal of 30 percent replacement fuel by 2010 (or other goal if modified under the proper modification procedures set out in 42 U.S.C. § 13254) is not expected to be achieved without a private and municipal fleet requirement program; and

(2) the 30 percent goal (or goal as modified under section 13254) is practicable and achievable with a private and municipal fleet requirement program in combination with voluntary means and other programs. Id. at § 13257(e)(1)(A), (B).

If DOE determined that a private and municipal fleet requirement program was not necessary, by January 1, 2000 it should have published this determination in the Federal Register as a final agency action, including an explanation of DOE's findings and basis for the determination. Id. at § 13257(f)(2). If DOE determined that a private and municipal fleet requirement program was necessary, by January 1, 2000 it should have required by rule that of the total number of new light duty motor vehicles acquired for a private and municipal fleet, certain percentages must be AFVs beginning in model year 2002. Id. at §13257(g)(1). The following phased-in percentages of AFVs would apply: 20 percent of the light duty motor vehicles acquired in model year 2002 must be AFVs; 40 percent in model year 2003 must be AFVs; 60 percent in model year 2004 must be AFVs; and 70 percent in model year 2005 and thereafter must be AFVs. Id. at § 13257(g).

In considering whether a private and municipal fleet requirement is necessary, DOE may also consider modifying the goal of 30 percent petroleum motor fuel reduction by 2010 in section 13252(b)(2)(B), and establish a revised goal, if DOE determines through the proper rulemaking procedures in section 13257(c) that the goal in place is inadequate, impracticable, or not expected to be achievable. Id. at § 13257(e)(2). In addition, the Act authorizes the Secretary to establish lower percentages of AFV purchasing requirements (not less than 10 percent) or later years for initiating the program. Id. at §§ 13257(g)(2), 13257(e)(2).

II. DOE's Proposed Rule Violates EPAct

When DOE failed to consider a private and municipal fleet rulemaking by the above deadlines and violated other provisions of EPAct, the Center, Bluewater Network, and Sierra Club sued to compel compliance. Center for Biological Diversity v. Abraham, 218 F. Supp. 2d 1143 (N.D. Cal. 2002). One result of the Center's lawsuit was a court order directing DOE to issue a proposed private and municipal fleet rule by January 27, 2003 (subsequently extended for 30 days) and a final rule by November 27, 2003. Although DOE has now issued the proposed rule, it does not comport with EPAct's requirements.

The proper inquiry is whether such a rule is "necessary," which under the statute is a two-part test: (1) the goal of 30 percent replacement fuel by 2010 (or other goal if modified under 42 U.S.C. § 13254) is not expected to be achieved without a private and municipal fleet requirement program; and (2) the 30 percent goal (or goal as modified under section 13254) is practicable and achievable with a private and municipal fleet requirement program in combination with voluntary means and other programs. Because both elements are satisfied, DOE should have issued a proposed rule implementing the private and municipal fleet rule.

Instead, the proposed rule contends that it is not "necessary" to issue a rule requiring private and municipal fleets to acquire AFVs because it would not "appreciably contribute" to the achievement of EPAct's existing 2010 replacement fuel goal of 30 percent "or of a revised replacement fuel goal were one to be adopted," and would result in "no appreciable increase in the percentage of alternative fuel and replacement fuel used by motor vehicles in the United States." 68 Fed. Reg. 10,320. DOE expressly stated that its conclusion was based on two interrelated findings: (1) that the number of fleets that would be covered and the number of AFV acquisitions that would occur are too small to make a difference; and (2) even if an AFV rule were adopted and substantial numbers of AFVs were acquired, there is no assurance that the fleets would actually use replacement fuels. Both of DOE's premises are fundamentally flawed and reflect an alarmingly apathetic and defeatist attitude in light of the Congressional mandates and aspirations reflected in EPAct.

A. The Goal Of 30 Percent Replacement Fuel By 2010 Is Not Expected To Be Achieved Without A Private And Municipal Fleet Requirement Program

DOE does not dispute that the country has no chance of meeting the 30 percent replacement goal without a private and municipal fleet program. Nor could it given the government's feeble record of reducing our reliance on petroleum-based motor fuel. As a result, the first element of the two-prong test for determining whether a private and municipal fleet program is "necessary" is clearly met. DOE's failure to apply an AFV acquisition rule to private and municipal fleets is instead premised on its determination that even with the private and municipal fleet rule, the government has no chance of reducing the country's petroleum consumption.

B. The 30 Percent Goal (Or Goal As Modified Under Section 13254) Is Practicable And Achievable With A Private And Municipal Fleet Requirement Program In Combination With Voluntary Means And Other Programs

DOE contends that it would take "extraordinary measures" to meet the EPAct's goal of 30 percent reduction in petroleum consumption, and a private and municipal rule would fall far short of

the miracle needed to achieve the necessary reduction.[1] 68 Fed. Reg. at 10,321. The basis for DOE's dismal outlook on the practicability and achievability of this goal is premised on flawed assumptions.

As an initial matter, DOE has forgone duty to revise the 30 percent goal in large part because, according to DOE, Congress might enact legislation that could affect the achievability of the current goals or what potential revised goals might be. 68 Fed. Reg. at 10,321. In other words, DOE is acting in direct contravention of an existing statutory duty in anticipation of legislation that may never occur. DOE was required to examine the 30 percent reduction goal three years after EPAct's enactment (or by 1995), and periodically thereafter. 42 U.S.C. § 13254(a). While DOE does not believe that it has an obligation to revise the petroleum replacement fuel goal, 68 Fed. Reg. at 10342, EPAct requires that DOE "shall, by rule, establish goals that are achievable" if the Secretary determines that the 30 percent replacement goal "including the percentage requirements or dates" are not achievable. 42 U.S.C. § 13254(b). Although DOE has made abundantly clear that it does not believe the 30 percent goal is achievable, it has failed to modify the goal and as a result is in continuing violation of this provision. DOE's emphasis on the fact that the reduction of 30 percent of our petroleum motor fuel is a "goal" does not somehow erase the word "shall" from related provisions designed to help achieve or modify that goal.

In addition, DOE contends that the number of AFVs resulting from a private and municipal fleet rule would be too small to make a meaningful difference. In support of this proposition, DOE points to EPAct's limited application to a defined world of vehicles. It is true that the Act only applies to fleet vehicles (group of 20 or more light duty motor vehicles used primarily in a metropolitan area with a 1980 population of more than 250,000) and exempts vehicles, such as law enforcement, emergency, and military vehicles, from coverage. 68 Fed. Reg. at 10,322, 10,337. However, that Congress included these exemptions in order to ease implementation of the AFV requirements and not practically impair important activities should not now be used to render EPAct's AFV requirements completely meaningless. Congress is not presumed to do a futile thing, and the evidence before DOE clearly indicates that the fleet rule would make a difference. Nor does the fact that Congress provided for limited exemptions to the AFV acquisition requirements render the requirement itself meaningless as DOE contends. 68 Fed. Reg. 10,322, 10, 337-38.

It is alarming that DOE takes the position that a private and municipal fleet rule would not result in the purchase of enough AFVs or alternative fuel to make a difference when this rule would result in an estimated 320,000 additional AFVs replacing traditional gasoline powered vehicles. 68 Fed.Reg. at 10339. This number of vehicles acquired annually will have a profound effect on the market for AFVs and alternative fuel. This is over five times the size the annual federal fleet AFV acquisitions should have been had federal agencies complied with EPAct. The fact that the federal fleets acquired closer to 20-25,000 AFVs in plain violation of EPAct should not be used by DOE to predict or encourage a similar flagrant violation of the law by the private and municipal fleet. 68

[1] DOE's faith in the FreedomCAR and Hydrogen Fuel Initiative, which according to DOE may have the effect of "dramatically increasing the availability and use of replacement fuels and reducing reliance on petroleum as a motor fuel," 68 Fed. Reg. at 10321, does not square with its conclusion that even with voluntary and other measures, the 30 percent reduction goal cannot be met. How DOE can exhibit so much pride in its other alternative fuel programs, such as the Clean Cities Program, FreedomCAR and Hydrogen Fuel Initiative when they are admittedly ineffectual is unclear.

Fed.Reg. at 10339.[2] With the Center, Bluewater Network, and Sierra Club's successful lawsuit against seventeen federal agencies, these violations will hopefully subside.

Furthermore, even under DOE's conservative estimates, the private and municipal fleet rule would result in a one percent reduction of petroleum fuel consumption.[3] In the context of a country responsible for 25 percent of the world's oil consumption and a disproportionate share of the atmosphere's greenhouse gases, DOE's argument that this is an irrelevant reduction is unfathomable. To the contrary, even a one percent reduction would have a profound impact. In economic terms, DOE itself acknowledged that a 1 percent decrease in U.S. petroleum demand would reduce the world oil price by 0.5 percent in the long run and would have even greater short-term impacts, 68 Fed. Reg. 10,324. More importantly, this reduction would result in substantial environmental and public health benefits.

Equally perplexing is DOE's determination that a private and municipal fleet rule would have no benefits because there is no assurance that the AFVs acquired as a result of the rule would actually operate on alternative fuels. DOE relies heavily on its interpretation of EPAct as bestowing no authority on DOE to require that vehicles actually use replacement fuels and on its belief that market forces would conspire against appreciable increases in use of alternative fuels. DOE's views are not only unduly pessimistic, but also wrong.

DOE relies heavily on the failure of federal fleets to use alternative fuels in their AFVs as an indicator of the anticipated behavior of private and municipal fleets. In highlighting the failure of federal fleets to use alternative fuels (and thereby stimulate the market for such fuels and AFVs), DOE overlook its primary responsibility for this failure. Despite DOE's wrong and lengthy statement to the contrary, 68 Fed. Reg. at 10338, EPAct does require federal fleets to use alternative fuels in their AFVs. Subsection (d) of the federal fleet AFV acquisition provision states that "[t]he provisions of section 400AA of the Energy Policy and Conservation Act [42 USCS § 6374] relating to the Federal acquisition of alternative fueled vehicles shall apply to the acquisition of vehicles pursuant to this section." 42 U.S.C. 13212(d). Energy Policy and Conservation Section 400A (codified at 42 U.S.C. 6374(a)(3)(E)) requires that duel-fuel federal fleet vehicles must use alternative fuels unless the Secretary of Energy determines that operation on alternative fuels is infeasible. DOE has never made the determination that use of alternative fuels in duel-fueled vehicles is infeasible pursuant to Section 400AA. Therefore, EPAct explicitly incorporates the alternative fuel use provision of the Energy Policy and Conservation Act into its federal fleet AFV acquisition requirement.

---

[2] DOE's concern that there will not be an adequate supply of AFVs available for the private and municipal fleets, 68 Fed. Reg. at 10340, overlooks that this is a fundamental purpose of the Act—to catalyze the market and infrastructure.

[3] The correct analysis is the percentage reduction of our petroleum fuel consumption. There is no support for DOE's contention that replacement fuel goals "cannot be met by simply using less petroleum (such as through efficiency measures), but rather must be met by increasing the overall percentage of non-petroleum or replacement fuels that is used." 68 Fed. Reg. at 10321 n.1. If we reduce our gasoline consumption, while keeping replacement fuel use constant, we still advance toward the 30 percent goal as Congress intended.

DOE has directly contradicted Congress's express language and declared intent not just by failing to make an infeasibility finding under section 400AA of the Energy Policy and Conservation Act, but more alarmingly by reading out of the EPAct the requirement that federal fleets actually use alternative fuel. DOE's failure to enforce this requirement significantly undermines the Act's effectiveness and the achievability of its goals. If DOE actually enforced this requirement, we could be substantially closer to attaining the 2010 goal of 30 percent reduction of petroleum fuel, rendering the achievement of these goals more likely with the addition of a private and municipal AFV requirement.

More importantly, subsection (g) of the private and municipal rulemaking provision specifically states that "[a] vehicle operating only on gasoline that complies with applicable requirements of the Clean Air Act [42 USCS §§ 7401 et seq.] shall not be considered an alternative fueled vehicle under subsection (b) or this subsection." 42 U.S.C. § 13257(g)(4). Therefore, DOE's contention that it has no authority to require private and municipal fleets to actually operate on alternative fuels is wrong.

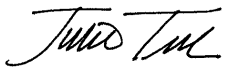
III. DOE Has Violated The National Environmental Policy Act (NEPA)

DOE concluded that because the negative determination regarding the necessity for a private and municipal fleet would not require anyone to act or refrain from acting, its determination is categorically excluded from NEPA. 68 Fed. Reg. at 10,343. The categorical exemption DOE invoked applies to "Rulemaking interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended." 10 C.F.R. Part 1021, Appendix A, at A5. However, this decision not to apply an AFV requirement to private and municipal fleets does not interpret or amend an existing rule, therefore the categorical exclusion is wholly inappropriate. Furthermore, DOE's decision not to promulgate a private and municipal fleet rule has a significant detrimental impact on the human environment by withholding action that would reduce petroleum consumption and its attendant environmental damage. As a result, DOE is required to comply with the environmental impact assessment procedures of NEPA.

IV. Conclusion

There are numerous other errors in DOE's proposed rule, but our primary concern is that DOE's private and municipal fleet decision is not rationally related to the information in the Department's possession, nor is it consistent with DOE's statutory mandates. We look forward to your response to our concerns. In addition, please add the Center to your mailing list for all future documents relating to this proposed rulemaking. Mail the documentation to my attention at the address on this letterhead.

Sincerely,



Julie Teel, Esq.